Supreme Court, U.S.
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NO. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1996

CALLISTIUS UGWU PETITIONER

V.

STATE OF ARKANSAS RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
FROM THE ARKANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Callistius Ugwu

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QUESTIONS PRESENTED FOR REVIEW

1. Whether allowing speculative testimony with regard to whether the auction company had paid the owner of an automobile allegedly stolen by Petitioner out of a sense of responsibility for having allowed such theft so tainted the bench trial that Petitioner was denied Due Process of law and a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution.

2. Whether when the evidence pointed equally at two (2) equally plausible possibilities, one of which inculpated and one of which exculpated Petitioner, the trial judge at Petitioner's bench trial as finder of fact could constitutionally find for

his guilt beyond a reasonable doubt.

PARTIES TO THIS PROCEEDING

All parties are listed in the case caption. This is a criminal matter involving only the State of Arkansas and Petitioner, Callistius Ugwu, a Nigerian national. No corporate or business entity is involved in this matter as a party.

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B. STATE STATUTES AND RULES:

Arkansas Code Annotated 5-36-103 . . . . . 9, 11, 20

Arkansas Uniform Rules of Evidence, Rule 602 10,16

C. CONSTITUTIONAL PROVISIONS:

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Amendment XIV 9, 15, 17, 19

CITATION OF OFFICIAL REPORT OF OPINION

Callistius Ugwu v. State of Arkansas, CA CR96-7, Slip Op Arkansas Court of Appeals (October 16, 1996) Opinion not designated for publication.

STATEMENT OF JURISDICTION OF THIS COURT

A. Date Judgment Entered: Entered on October 16, 1996, by the Arkansas Court of Appeals, a court of last appellate resort within and for the State of Arkansas.

B. Orders on Rehearing or Extension: None

C. Reliance on Rule 12.5: None

D. Statutory Basis for Writ of Certiorari: 28 USC Section 1257

E. Special Notifications Under Rule 29: Not applicable. The State of Arkansas is being provided with a copy of this Petition.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINACNES AND REGULATIONS INVOLVED IN THIS CASE:

AMENDMENT V, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI, UNITED STATES CONSTITUTION

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

and caused of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV, SECTION 1, UNITED STATES CONSTITUTION

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Code Annotated 5-36-103. Theft of property.

(a) A person commits theft of property if he:

(1) Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner thereof; or

(2) Knowingly obtains the property

of another person, by deception or by threat, with the purpose of depriving the owner thereof.

(b)(1) Theft of property is a Class B felony if:

(A) The value of the property is two thousand five hundred dollars ($2,500) or more;

Arkansas Uniform Rules of Evidence, Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

STATEMENT OF THE CASE

This case arises from the conviction of Petitioner in the Circuit Court of Pulaski County, Arkansas, and the subsequent appeal to the Arkansas Court of Appeals, which, along with the Arkansas Supreme Court, sits as a court of last appellate review within its areas of jurisdiction. Petitioner has thus exhausted State court review.

At bench trial Petitioner was found guilty of theft of property valued in excess of $2,500.00 in violation of Arkansas Code Annotated 5-36-103 and sentenced to 10 years in the Arkansas Department of Corrections.

At trial the evidence developed

that a 1987 Honda Accord automobile belonging to a former Pulaski County Deputy Prosecuting Attorney, Mr. Chris Palmer, was driven away from the Mid-Ark Auto Auction by Petitioner. The dealer who had carried this vehicle to the auction, one Ronald Colding, stated that he saw Petitioner drive the car away but thought that he had paid for it. Colding also testified that the auction had paid him for the automobile, and upon questioning by the State, opining over objection that this was from some sense of responsibility for having allowed the vehicle to be stolen. See Record at page 60-62.

Petitioner's version of events was that he had bid on the automobile

and was the highest bidder. He testified further that when he took the car from the auction he discovered that the "CV joints" were clicking and explained that if such a defect was discovered and if the defect would cost more than $100.00 to repair, the automobile could be returned. However, Petitioner and Colding struck a deal to split the costs of repairs. Petitioner alleged that the auction, not he, was responsible for payment to Colding and that in any event he was acting as agent for yet a third person, named Benjamin, in buying the car.

After a bench trial, the Court found Petitioner guilty of the crime charged. Counsel for Petitioner had

renewed all motions at the end of the evidence. T-80. This included the objection based on Rule 602 of the Arkansas Uniform Rules of Evidence.

Appeal was taken to the Arkansas Court of Appeals. At that point the real prejudicial effect of Colding's testimony became apparent. The Court of Appeals ruled as a matter of law that an inference could be drawn from the circumstantial evidence which favored either party--i.e. either there had been a payment or the auction "goofed" and let someone steal the car in question.

Based upon this finding, and the objection raised, Petitioner herein seeks review on Writ of Certiorari to resolve questions relating to the

Fifth, Sixth and Fourteenth Amendments

as applied in this case.

ARGUMENT

In its decision of October 16, 1996, the Arkansas Court of Appeals held in this case:

> It's obvious that an inference could be drawn from the evidence that would favor either party to this case--either the auction had been paid for the car by the appellant or the auction had "goofed" and let someone steal a customer's car. However, this is not really a problem about the admissibility of the evidence, and we think the matter was within the sound discretion of the trial judge.
>
> Arkansas Court of Appeals, Slip Op. p. 5

Petitioner disagrees vehemently with the assertion that was a purely discretionary matter with the trial judge. Rule 602 of the Arkansas Uniform Rules of Evidence requires that testimony be given from personal

knowledge.

The *sine qua non* for a criminal conviction is that each material element of the case against a defendant be proven beyond a reasonable doubt. In re: Winship, 397 US 358 (1970). To do less violates the Fifth and Sixth Amendments of the United States Constitution, as well as the Due Process guarantees of the Fourteenth Amendment. Id. Jackson v. Virginia, 443 US 307 (1979)

The judge, as trier of fact in this matter, had a duty no less than that of a juror to listen to all the evidence fully and fairly, and to decide doubt beyond a reasonable doubt. Jackson supra The Court of Appeals has made plain that proof

beyond a reasonable doubt did not exist and that there were at least two (2) reasonable explanations of events, one inculpatory, the other exculpatory, which could have been adduced by the circumstantial evidence of the case. Under such circumstances, Arkansas law requires a finding of "not guilty" See Hadley v. State, 322 Ark 472, 910 SW2d 675 (1995). Yet the Court of Appeals failed to act upon this finding.

The only possible evidence which could have influenced the finder of fact here was Coldings' assertion that the Mid-South Auto Auction somehow felt repsonsible that his car was "stolen". Timely objection was raised to this speculative testimony and

overruled. Petitioner's Fifth, Sixth and Fourteenth Amendment right to fundemental fairness and a fair trial was thus compromised to his prejudice.

It is axiomatic that a conviction must be upon proof of the State's case "beyond a reasonable doubt". In re: Winship supra. The "critical inquiry" is one of whether the evidence of record would support a finding of guilt beyond a reasonable doubt. Jackson supra at p. 318. Here we have a court of last resort making a finding that the trial court had before it two equally plausible explanations, to wit, the Defendant/Petitioner either stole the car or an unfortunate mistake was made by all concerned and there was thus no

intent to do wrong. The pertinent statute states:

> (a) A person commits theft of property if he:
>
> (1) *Knowingly* takes or exercises *unauthorized control* over, or makes an *unauthorized transfer* transfer of an interest in, the property of another person, with the purpose of depriving the owner thereof; or
>
> (2) *Knowingly obtains the property of another person,* by deception or by threat, with the purpose of depriving the owner thereof.
>
> Arkansas Code Annotated 5-36-103.
> (Emphasis suppled)

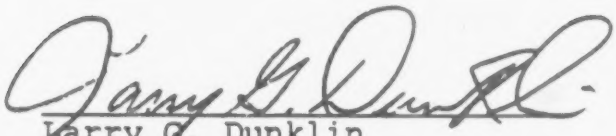
Thus, to meet the burden of In re: Winship supra and of Jackson supra, there had to be proof that the actions of Petitioner were both knowing and unauthorized. The undisputed testimony at trial was that Petitioner

believed he was legitimately entitled to the vehicle in question and that his actions were not unauthorized. The Court of Appeals found, as a matter of law, that this was a permissible inference to be drawn from the evidence, that it was "obvious" an inference could be drawn that the car had been paid for. Slip op. page 5. There was thus no proof beyond a reasonable doubt as to these elements of the offense charged.

CONCLUSION

For each of these reasons, the Petition for Certiorary should be granted.

Respectfully submitted,



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APPENDIX

Arkansas Court of Appeals, Opinion 10/16/96

NOT DESIGNATED FOR PUBLICATION
SEE REVIESED SUPREME COURT RULE 21

DIVISION II

ARKANSAS COURT OF APPEALS

NO CACR96-7

Opinion Delivered

October 16, 1996

CALLISTIUS UGWU,
APPELLANT

An Appeal From The Pulaski County Circuit Court

V.

Hon. John Plegge, Judge.

AFFIRMED

STATE OF ARKANSAS,
APPELLEE

MELVIN MAYFIELD, Judge

Callistius Ugwu was found guilty by the judge sitting as trier of fact

of theft of property of the value of more than $2500 and was sentenced as an habitual offender to ten years in the Arkansas Department of Correction. Based upon the same evidence, plus evidence of the failure to make restitution as ordered, appellant's suspended imposition of sentence was revoked in another case, and he was sentenced to ten years on the revocation. The sentences were to run concurrently, but consecutively to any federal sentence he may have been serving.

At trial, Chris Palmer testified that in November 1993 he traded a 1987 Honda Accord for a new mini-van at Balch Motors, and Ronald Colding testified that he was in the used car

business and he purchased the Chris Palmer car from Balch in November of 1993. Colding said that he took the car to Mid-Ark Auto Auction where he

(Page 2)

saw the appellant and they talked about the price of the car; however, the car did not sell at the auction. Nevertheless Colding said, as he was leaving the auction that day he saw the car leave the auction with appellant driving it, and he thought appellant must have bought the car. Colding testified that he had not conveyed the title to the car and had not given appellant permission to take the car without purchasing it. On cross-examination Colding said Mid-Ark had paid him for hte car after it was

discovered that the vehicle had been taken from the auction without the necessary paperwork being signed and that it had been sold using Chris Palmer's name. Then, on redirect examination, over defense counsel's objection to the witness's lack of personal knowledge, Colding was allowed to testify that they paid him for the car because "they felt that the had a responsibility to pay me."

Kim Arnold testified that she purchased a 1987 Honda Accord from appellant, who represented himself to be Chris Palmer, after answering an advertisement in the newspaper. She said the final transaction was completed before a loan officer at a bank where the appellant also

identified himself as Chris Palmer.

Appellant then took the witness stand in his own defense and testified that he was at the auction to buy cars; that he was the highest bidder on the Honda Accord and that he signed the necessary documents. He testified that he took the car from the auction and while driving it discovered that the "CV joints" were clicking. He explained that if you buy a car at auction and discover that it

(Page 3)

needs more than $100 worth of repairs you can turn the car down. But he said he talked to Mr. Colding and they agreed to split the cost of fixing the CV joints. According to appellant, he was not responsible for paying Colding

for the car; the auction pays the buyer. Whe asked if the auction had been paid, the appellant replied, "Yes, to the best of my knowledge. " The judge then asked, "Are you saying you paid them?" Appellant said, "I saw the receipt that says that--." The judge then asked again, "Did you pay for the car?" Appellant replied, "No, sir. Not me, personally." Appellant testified that his friend Benjamin, for whom he had bought the car, paid for it. He identified a vehicle release that he said he signed at the auction when he purchased the vehicle. On cross-examination the appellant said he was present when the car was sold to Kim Arnold, and that she only assumed he was Christopher Palmer when

she saw the title. He admitted putting an ad in the paper to sell the car but he insisted he did not tell Ms. Arnold that he was Christopher Palmer.

Appellant's only argument on appela is that the judge committed reversible error by allowing the victim of the alleged theft of property to give speculative testimony. It is appellant's contention that it was error for the trial court to allow Mr. Colding to testify as to why the auction company paid him for the Honda Accord because the testimony was speculative and only an employee of the auction had personl knowledge as to why Mr. Colding had been paid. Appellant contends the

testimony was prejudicial.

(Page 4)

Appellant's defense to the charge of theft of property was that no theft occurred. He argues that the fact that the auction paid Colding for the car supports his defense because the auction, presumably, would not have paid Colding if it had not been paid, and Colding's speculative explanation as to why the auction paid him weakened appellant's position that he bought the car from the auction. Appellant contends someone from the auction should have testified about the reason that Colding was paid.

Arkansas Rules of Evidence 602 provides in the pertinent part:

> Rule 602. Lack of personal knowledge.--A witness may not testify

> to a matter unless evidence is introduced sufficient to support a finding that he has personl knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is sugject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

In Beard v. Ford Motor Credit Co. 41 Ark App 174, 850 SW2d 23 (1993), the appellant argued that the trial court erred in admitting unqualified testimony and hearsay. Appellant contended that a witness was not qualified to testify as to how repossessed cars are generally sold and in particular how appellant's car was sold. This court said:

> Initially, we note that a trial judge has wide discretion in determining the qualification of witnesses and the admissibility of evidence. Michael v. State, 309 Ark 151, 156, 828 SW2d 351, 354 (1992). A witness may not

> testify to a matter unless he has personal knowledge of the matter, see Ark. R. Evid. 602, and based on [the witness's] statements regarding his familiarity with appellee's business, we cannot say that the trial judge abused his discretion in finding the witness competent to testify to the practice employed by appellee in the sale of repossessed cars or to the practice generally followed by the automobile industry

(Page 5)

41 Ark App at 177, 850 SW2d at 25.

It's obvious that an inference could be drawn from the evidence that would favor either party to this case--either the auction had been paid for the car by the appellant or the auction had "goofed" and let someone steal a customer's car. However, this is really not a problem about the admissibility of the evidence, and we think the matter was within the sound

discretion of the trial judge. And in light of the testimony of Kim Arnold that the appellant represented to her and the bank's loan officer that he was Chris Palmer, we do not believe the judge committed prejudicial error by admitting the evidence about the reason that the auction paid Colding for his car.

Affirmed.

Pittman and Stroud, JJ. agree

MR. (sic)JACKSON: That's all I have, Your Honor. I would like to renew my motion. I don't think it shows that Mr. Ugwu, in fact, did not pay for the vehicle, that Mr. Colding was paid for the vehicle by the auction, and Mr. Ugwu paid the auction for the vehicle, or his friend did, because he bought the car for his friend and his friend paid the auction. The auction paid Mr. Colding so I don't feel there has been any theft here. And I would move to dismiss both cases.

THE COURT: Motion denied. Anything further? All right, come up to the podium, please.

BEST AVAIL

All right. In case number 95-942, there'll be a finding of guilty and it'll be the judgment and sentence of this court that you be taken by the sheriff of Pulaski County, Arkansas, and delivered to the Arkansas Department of Correction, there to serve a term of ten years. In case number 92-1528, your suspended imposition of sentence in that case is hereby set aside and you're sentenced to a term of five years in the Department of Correction on count one and ten years in the Department of Correction on count two, those to be concurrent with the time to be served in case 95-942.

ABLE COPY

Testimony of Ronald Colding: (T-59-62)

Q. The auction paid you for the car?

A. Yeah, the auction paid me.

Q. So the auction did pay you for the car, correct? (T-59)

A. Right

Q. Okay

A. But not through of from proceeds from his pocket.

Q. Just answer my quetion.

A. Well, he--

Q. Answer my question.

A. The auction paid me but it wasn't from any proceeds from Caly.

Q. You have no personal knowledge, though, of that?

A. Yes, I do have personal knowledge.

Q. All you can answer is that you got paid by the auction, correct?

MR BECQUETTE: Judge, I'd ask--

A. I do have personal knowledge of that.

MR. BECQUETTE: --that he be allowed to answer the question. I mean, he's trying to answer it.

THE COURT: If he says he has personal knowledge of it, he can go ahead and embellish his answer.

MS. JACKSON: That's all right. I've already got my answer.

THE COURT: Okay. Anything futher?

MR. BEQUETTE: Yes, sir.

. . . . . (T-60)

REDIRECT EXAMINATION

BY MR. BEQUETTE:

Q. Tell the Court how you--tell the Court about your personal knowledge.

A. My personal knowledge about it? When my banker called me concerning this Honda, I told him it was sold at the auction. I went over to the auction with the title to get a check. It was not draft signed by Caly.

MS. JACKSON: I want to object, Your Honor, because that's not personal knowledge. That's just what somebody at the auction can testify to. He doesn't have personl knowledge of that.

MR. BEQUETTE: She opened the door on this.

THE WITNESS: I don't have personal knowledge of it when I've got auction papers in here with me? I don't understand what you're saying.

THE COURT: All right. The

objection will be sustained. Anything further of this witness?

MR. BEQUETTE CONTINUING:

Q. You were told--under cross-examination you told Ms. Jackson that you were paid by the auction for this car, is that right?

A. Right.

Q. Okay. Explain when and why you were paid by the auction for this car. (T-61)

MS. JACKSON: Your Honor, I think that this--I'm not trying to beat a dead horse because I think we've just been throughy all that and I objected and you sustained my objection.

THE COURT: Well, its a different question. Overruled. Go ahead.

MR. BEQUETTE CONTINUING:

A. Could you repeat that again?

Q. Sure. Explain to the Corut when you were paid by the auction for this car and why, at that time, you were paid and why you were being paid.

A. I was paid by the auction after all the circumstances found out about this vehicle where it was took from the auction without the necessary paperwork being signed, where it was sold, using Chris Palmer's name, where it was registered.

Q. And why did htey pay you?

A. Because they felt thtat they had a responsibility to pay me. Right. This is why they paid me for the car.